IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1012

FRIBESCO S.A. and OTELLO MANTOVANI,

Petitioners,

against

MITSUI & CO., (U.S.A.), INC., FINAGRAIN S.A. COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE a/k/a "FINAGRAIN" COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE S.A., R. PAGNAN & F.lli, LOUIS DREYFUS CORPORATION and TRADAX OVERSEAS, S.A.,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

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To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Fribesco S.A. and Otello Mantovani (hereinafter referred to as "Fribesco" and "Mantovani", respectively, and collectively as "Petitioners") pray that a writ or writs of certiorari issue to review orders made in these consolidated appeals by the Appellate Division, First Department of the Supreme Court of the State of New York on June 2, 1977.

Opinions Below

The original opinion of the Supreme Court of the State of New York, New York County, Special Term, Part I (Stecher, J.), rendered in one proceeding but made ap-

plicable to all, has not been reported. A copy of the opinion is appended hereto as Appendix A.

The orders of the Appellate Division, First Department of the Supreme Court of the State of New York, affirming the orders of Special Term, upon the opinion below, are reported at —— A.D. 2nd ——, 394 N.Y.S. 2d 832-834. Copies of said orders are appended hereto as Appendix B inclusive. No opinion was rendered.

The order of the Court of Appeals of the State of New York, denying leave to appeal thereto from the orders of the Appellate Division, First Department, has not yet been officially reported. A copy thereof is appended hereto as Appendix C.

Jurisdiction

The orders of the Appellate Division, First Department as to which review is sought herein were made and entered on June 2, 1977.

An application to the Court of Appeals of the State of New York for leave to appeal thereto from the orders of the Appellate Division, as aforesaid, was timely made, and denied by the Court of Appeals by order made and entered October 18, 1977.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257 (3).

Questions Presented

1. Where a commercial arbitration will necessarily require a determination of the function and effect of the United States Grain Standards Act (7 U.S.C. § 71 *et seq.*), the implementing regulations of the Department of Agriculture and the Department's procedural guidelines (annexed hereto as Appendix D), is the dispute arbitrable, or do the

issues involve such matters of public policy as to make the dispute referable to judicial determination?

2. Should the Court disqualify an arbitrator, or panel of arbitrators, prior to the holding of hearings in arbitration, where the record identifies each member of the available arbitration panel and his affiliations, and shows that each individual on the panel is or should be disqualified for cause, and that the panel as a whole is institutionally imbalanced in favor of one segment of the industry from which its members are to be drawn?

Statutes and Regulations Construed

United States Grain Standards Act; 7 U.S.C. §§ 71, 74 *et seq.,* particularly §§ 74, 77 and 79 (a) and (d) of 7 U.S.C. (Set forth at App. D, pp. A 16-17) (Prior to Amendment by P.L. 94-582)

Regulations of the U.S. Department of Agriculture; 7 C.F.R. § 26.110 (Set forth at App. D, pp. A 17-23)

United States Arbitration Act; 9 U.S.C. §§ 1 *et seq.,* particularly §§ 2, 5 and 10 of 9 U.S.C. (Set forth at App. D, pp. A 23-24)

Statement of the Case

Petitioners are both foreign importers of United States grain. Respondent Louis Dreyfus Corporation is one of the five major United States exporters of U.S. grain. Respondents Finagrain S.A. and Tradax Overseas S.A. are wholly-owned European subsidiaries of the two largest U.S. exporters, respectively Continental Grain Co. and Cargill Incorporated. Respondent R. Pagnan & F.lli is an Italian grain importer. Respondent Mitsui & Co. (U.S.A.), Inc. is a United States subsidiary of the giant Japanese trading firm, Mitsui & Co., Ltd.

Petitioners had contracts with respondents, each for the sale and delivery to them of 25,000 long tons of U.S. No. 3 yellow corn, which was to be supplied from the 1974/75 corn crop, for delivery f.o.b. U.S. Gulf during the period April-June, 1975. Each contract was made subject to the terms of the standard industry f.o.b. export contract, form no. 2 of the North American Export Grain Association (hereinafter "N.A.E.G.A. 2") (App. E). The N.A.E.G.A. 2 contract form, in addition to a broad arbitration clause, contains several clauses of particular significance to this proceeding:

> "Commodity—_____ In accordance with the official grain standards of the United States or Canada, whichever applicable, as in effect on contract date."
>
> "Quality—Quality and condition to be final at port/s of loading in accordance with official inspection certificate/s."
>
> "Delivery—Delivery between the dates of _____ and _____ both inclusive, at discharge end of loading spout . . ."

Petitioners, in accordance with the contracts, nominated two vessels to take delivery of the corn under the various contracts, the MOSGULF and the SIDNEY BRIDGE. When these vessels arrived at the loadports, in each case, the respective petitioner refused to take delivery of the corn unless it was provided with an inspection thereof at the spout (i.e., the point of delivery). These requests were declined in all cases by the seller to the particular petitioner, each seller asserting that the USDA Grain Inspection Manual, which mandates sampling at points remote from the loading spout, precluded the requested spout inspections. Since no accommodation could be reached, the vessels sailed without taking delivery of the corn from respondents.

Thereafter, arbitration proceedings were commenced against petitioners by respondents Mitsui and Tradax. Pagnan was made respondent in arbitrations demanded against it by respondents Finagrain and Dreyfus, as to which Pagnan passed along those claims by demanding arbitration against petitioner Fribesco. Pagnan thereafter petitioned the New York State courts for consolidation of the arbitrations demanded against it with the respective arbitrations demanded against petitioner Fribesco. In those proceedings petitioner Fribesco cross-moved for a stay of arbitration, or, in the alternative, for an order disqualifying the stipulated arbitration panel and the members thereof and appointing independent arbitrators to hear the disputes in the event arbitration were compelled. As to the claims of Mitsui and Tradax, petitioner Fribesco and petitioner Mantovani separately petitioned the State Supreme Court for a stay of arbitration under New York C.P.L.R. § 7503. In those two proceedings, the respective respondent cross-moved for an order compelling arbitration.

All four proceedings were heard by the same judge. On October 6, 1976, Justice Stecher issued his memorandum opinion (App. A) and by separate orders made the opinion applicable to each proceeding pending before him. The orders entered by Justice Stecher denied petitioners' applications for a stay of arbitration, and the alternative applications for disqualification granted respondents' applications to compel arbitration, and granted Pagnan's applications to order consolidated arbitrations.

Petitioners thereupon took appeal to the Appellate Division of the State Supreme Court, First Department, which ordered the appeals consolidated for purposes of hearing and disposition. On June 2, 1977, the Appellate Court unanimously affirmed each of the orders entered below on the basis of Justice Stecher's opinion. (App. B)—On July 1, 1977, petitioners filed a joint motion for leave to appeal

to the New York State Court of Appeals under New York C.P.L.R. § 5602 (a) (1) (i). That joint motion was denied in all respects by the Court of Appeals by an order dated and entered October 18, 1977 (App. C).

The federal questions sought to be reviewed herein were raised in the court of original instance in petitioners' original petitions for stays of arbitration in the proceedings involving respondents Mitsui and Tradax, and in the cross-motions of petitioner Fribesco in the other two proceedings. In the former, paragraphs 5 and 6 of each petition state:

> "5. Respondent's inability to provide the required certificate arises from the fact that the United States Department of Agriculture, in violation of law and its own regulations, has approved improper sampling methods.
>
> 6. This dispute involves a question relating to the public policy of the United States which cannot appropriately be determined in arbitration."

In the latter, the federal questions are discussed throughout the affidavits of David A. Botwinik in support of the cross-motions.

In all cases, the fact that the issues were federal in character was raised either in terms or by strict implication.*

The federal questions were first raised in the appellate courts in petitioners' main briefs.

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* Although these cases proceeded in the state courts, and although the court of original instance cited at least once to state law, there is no question that the contracts in question "evidence . . . transaction[s] involving commerce" within the meaning of the federal Arbitration Act (9 U.S.C. § 2). Thus, the federal act applies to these proceedings, and supplants state law to the extent they are inconsistent. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Matter of Weinrott* [*Carp*], 32 N.Y. 2d 190, 199 n.2, 344 N.Y.S. 2d 848, 856 n.2 (1973).

Reasons for Granting the Writ

The thrust of petitioners' arguments is that petitioners will be compelled to advance, in defense of their positions in arbitration, several arguments concerning the validity and meaning of the United States Grain Standards Act, the implementing regulations of the Department of Agriculture, and the Department's instruction manual, which is not generally published and is available only upon request. These are complex legislative and regulatory materials, the construction and validity of which are not generally within the competence of trade arbitrators. Moreover, as petitioners pointed out below, consideration of these contentions would be inappropriate for arbitral resolution, first, because the very enactment of the Grain Standards Act and the implementing regulations was premised upon a clear expression of congressional concern for the public policy of this country and, second, because a resolution of the issues based upon the act and regulations would have a broad effect upon the system of export grain merchandising in the United States. It was then, and continues to be petitioners' belief that such matters should be resolved, at least in the first instance, by the courts as the properly constituted forum to consider and pass upon such issues of public policy when expressed in statutes of the United States.

A second policy issue raised by petitioners which is of significance concerns that clause of the N.A.E.G.A. 2 contract which states that quality and condition of the commodity are "to be final at port/s of loading in accordance with official inspection certificate/s." Such certificates are issued under a specific congressional mandate (7 U.S.C. § 79 (d), A 17), which prescribes the effect to be given thereto as "*prima facie*". As petitioners noted below, the effect of the "certificate final" clause is to convert a rebuttable presumption prescribed by statute into a conclu-

sive presumption which protects, not the foreign buyer, as intended by Congress, but the U.S. exporter. The validity of such a device, which is imposed by the standard industry contract and is, as a result, employed in practically every sale of U.S. export grain, should be scrutinized closely by the courts, not by trade arbitrators with a vested interest in preserving the effectiveness of the clause.

Finally, petitioners challenged the competence of both the arbitral panel and the individual members thereof to decide these disputes, even if the disputes were deemed to be arbitrable, under the mandate of *Commonwealth Coatings Corp.* v. *Continental Cas. Co.*, 390 U.S. 145 (1968). As to the panel, the argument is that it is unfairly and improperly constituted and should be disqualified under either 9 U.S.C. § 5 or the court's general equity powers. As to the members of the panel, petitioners argue that virtually each such individual should be disqualified either for cause, as classically defined, or because their commercial affiliations, inevitably, would prevent them from giving petitioners' public policy positions a fair hearing, regardless of the merits thereof.

POINT I

The question of whether the instant public policy issues preclude arbitral resolution should be decided by this Court in order to enunciate a clear principle on the arbitrability of public policy matters.

By granting a writ in these cases, the Court will have an opportunity to define the parameters of the public policy exception to arbitrability, an area of law which appears to be continually evolving in the courts. In *Wilko* v. *Swan*, 346 U.S. 427 (1958), this Court declared that matters arising under the Federal Securities Act of 1933 were not arbitrable, despite 9 U.S.C. § 2, under an agreement to arbitrate future disputes, because to permit such

arbitration might implicitly interfere with the provisions of 15 U.S.C. § 77n ("Contrary stipulations void"). A similar basis has been recently employed to limit the arbitration of claims against pension plan trustees under the Employment Retirement and Income Security Act (*Lewis* v. *Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 431 F. Supp. 271 (E.D. Pa. 1977). There have, in addition, been other cases where the lower courts have limited the arbitrability of disputes where there might be interference with an implicit or explicit statutory declaration that waiver of a benefit granted under the statute is void.

On the other hand, other cases which have recognized the limitation on the arbitrability of disputes concerning matters of public policy have not been premised upon such a particularized analysis. For example, in *American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F. 2d 821 (2nd Cir. 1968), a decision which, for all intents and purposes, established the non-arbitrability of anti-trust claims, the Second Circuit chose to rest its decision, not upon an implicit or explicit federal statutory prohibition, but upon a vaguely defined "public interest" in the maintenance of a competitive economy (*id.* at 826). In brief, the Circuit Court merely concluded that claims of antitrust violations are "of a character inappropriate for enforcement by arbitration." (*id.* at 825) *See*, also, *Helfenbein* v. *International Industries, Inc.*, 438 F. 2d 1068 (8th Cir. 1971); *Cobb* v. *Lewis*, 488 F. 2d 41 (5th Cir. 1974).

Another area which has been declared "inappropriate for enforcement by arbitration" involves patent validity. In *Lear, Inc.* v. *Adkins*, 395 U.S. 653 (1969), a case not involving arbitrability, this court noted the great public interest which attached to the validity of patents, to the extent that a patent licensee which, by the terms of its license, was estopped from contesting the patent's validity, would be permitted to do so, nevertheless, in the federal courts. That decision was later relied upon in a number of cases as authority for the proposition that claims of

patent validity were not arbitrable despite the existence of an arbitration clause in the relevant contract. *See*, e.g., *Beckman Instruments Inc.* v. *Technical Development Corp.*, 433 F. 2d 55 (2nd Cir. 1970), cert. den. 404 U.S. 872; *Diematic Mfg. Corp.* v. *Packaging Industries, Inc.*, 381 F. Supp. 1057 (S.D.N.Y. 1974). Again, we note that the non-arbitrability of questions concerning patent validity has not been grounded upon any statutory prohibition, but rather upon an unarticulated concept of the public interest or the national interest sufficient to preclude private arbitration of such disputes

In the present case, several critical matters of public policy will necessarily be involved in a resolution of these disputes. One such matter is the construction, meaning and effect, as noted previously, of the Grain Standards Act, the regulations adopted thereunder, and the less official "grain instructions" promulgated by the Department of Agriculture.

Section 2 of the Grain Standards Act (7 U.S.C. § 74) specifically makes the trading of export grain from the United States a matter of prime national importance, as to which Congress has felt compelled to legislate:

> SEC. 2 "Declaration of policy
>
> Grain is an essential source of the world's total supply of human food and animal feed and is merchandised in interstate and foreign commerce. It is declared to be the policy of the Congress, for the promotion and protection of such commerce in the interests of producers, merchandisers, warehousemen, processors, and consumers of grain, and the general welfare of the people of the United States, to provide for the establishment of official United States standards for grain, to promote the uniform application thereof by official inspection personnel, to provide for an official inspection system for grain, and to regulate the

> weighing and the certification of the weight of grain shipped in interstate or foreign commerce in the manner hereinafter provided; with the objectives that grain may be marketed in an orderly and timely manner and that trading in grain may be facilitated." 7 U.S.C. § 74 (prior to amendment).

It cannot be said, therefore, that a construction of the Act and its implementing regulations, as will be required herein, is of insufficient magnitude to warrant judicial scrutiny. Indeed, considering the unequivocal statutory intention, petitioners submit that such questions of construction and effect should not be dealt with in arbitration, at all. There is a clear distinction between those types of disputes typically arbitrated under the N.A.E.G.A. 2 contract, such as vessel nomination, cancellation, value of delivery, etc., and the issues which will be critical to a resolution of the disputes herein.

A specific matter under dispute is the Department of Agriculture's implementation of the statutory (7 U.S.C. § 77) and, indeed, regulatory (7 C.F.R. § 26.110) dictate that export grain be certificated based upon samples taken after final elevation as the grain is being loaded aboard the export vessel. USDA has approved sampling, however, which occurs up to ¼ mile from the delivery spout, resulting in a situation where the grain which is sampled (here, dry, brittle corn) may degrade in quality and condition due to subsequent handling during the loading process. In the present cases, where petitioners refused delivery because respondents declined to permit sampling at the spout, as required by law, the issue posed by the regulations and the USDA procedures are ripe for judicial consideration.

As to the "certificate final" clause, which petitioners maintain is void, unconscionable, and otherwise ineffective to bar proposed claims of unmerchantability and the like, petitioners analogize their situations to that of the patent

licensee in *Lear* v. *Adkins, supra,* whose contract with the patentee prohibited him from questioning the validity of the patent. This Court noted not only the great public interest in resolving questions of patent validity, but also noted that the character of the patent itself requires that the concept of "licensee's estoppel" be dispensed with:

> "Consequently, it does not seem to us to be unfair to require a patentee to defend the patent office's judgment when his licensee places the question in issue, especially since the licensor's case is buttressed by the presumption of validity which attaches to his patent. Thus, although licensee's estoppel may be consistent with the letter of contractual doctrine, we cannot say that it is compelled by the spirit of contract law, which seeks to balance the claims of promisor and promisee in accord with the requirements of good faith."

No less a situation obtains in the case of grain certificates. Indeed, they are quite similar to a patent, in that they are issued under governmental authority, represent a legal conclusion which may be the subject of error, are issued on the basis of *ex parte* applications by the exporter, and bear the presumption of validity. To say, however, that a grain inspection certificate is not strictly the same as the patent, is merely to beg the question; the true issue is whether such a certificate (which bears merely a presumption of validity, by statute [7 U.S.C. § 79 (d)] and not, as per N.A.E.G.A. 2, a conclusive presumption of validity) is sufficiently similar to a patent, and enjoys a similar measure of public interest, to preclude arbitration where the effect of the certificate is critical. Petitioners believe that such an analysis would lead to recognition of the fact that arbitration of claims which depend upon the validity of the "certificate final" clause of the N.A.E.G.A. 2 contract would be inappropriate.

POINT II

A writ or writs should issue so that the Court may further elucidate and settle the standards for the disqualification of both arbitrators and arbitration panels.

The last, and indeed the only expression of this court on the issue of the competency and qualifications of arbitrators is *Commonwealth Coatings Corp.* v. *Continental Casualty Co.,* 390 U.S. 145 (1968). In that case, this Court stated that:

> "Any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid the appearance of bias.'

Clearly, the Court's holding in that case was motivated by a strong desire to insure that arbitration, no less than litigation, afford a fair and impartial alternate forum for the settlement of disputes. A similar concern for fairness and propriety is evident, as well, in other relevant areas. For example, Article 9 of the Draft UNCITRAL Arbitration Rules (1976 Yearbook of the United Nations Commission on Trade Law, Vol. VII, pages 160-166 [U.N. Doc. A/CN. 9/112]), entitled "Challenge of Arbitrators," states:

> '1. Either party may challenge an arbitrator, including a sole arbitrator or a presiding arbitrator, irrespective of whether such arbitrator was:
>
> Originally proposed or appointed by him, or
>
> Appointed by the other party or an appointing authority, or
>
> Chosen by both parties or by the other arbitrators,
>
> *if circumstances exist that give rise to justifiable*

doubts as to the arbitrator's impartiality or independence.' Id. at 162 (emphasis supplied)

The Draft Rules go on to give a specification of circumstances which would "give rise to justifiable doubts as to the arbitrator's impartiality or independence;" however, as the commentary to the Rules makes clear (*id.*, at 170), that list is not exhaustive. The commentary further notes, echoing the concern of *Commonwealth Coatings*, "proof of the existence of a circumstance would disqualify an arbitor, even though no doubt existed as to the impartiality and independence of the arbitrators concerned."

The present case presents an issue not strictly within the scope of the court's opinion in *Commonwealth Coatings*, but of equal urgency, particularly in view of the recent great expansion in the use of arbitration as a means of settling commercial disputes: *viz.*, whether a designated panel from which arbitrators to hear disputes in a particular industry are to be drawn may be disqualified prior to the holding of hearings at the instance of an aggrieved party, much as a jury panel may be challenged (*cf.*, 28 U.S.C. § 1867). A collateral and related issue in these cases is whether, once the identities and affiliations of each of the members of the panel are known, a potential arbitrant may apply in court to have the individuals disqualified from hearing the dispute upon a showing of cause.

The relevant facts in this case are not greatly in dispute: Petitioners signed contracts containing a broad arbitration clause referring the settlement of disputes to arbitration under the Grain Arbitration Rules in the American Arbitration Association. The Rules themselves (App. F) indicate that the "panel" (from which the three arbitrators to hear the dispute are to be drawn) shall be composed of "persons actively engaged in, or retired from active engagement in the grain trade business." In point of fact, despite this description, which on its face indicates a broad membership on the panel composed of persons with highly varied interests in the trade (such as exporters, importers, attorneys, accountants, brokers, agents, and the like), the actual list of the members of the panel may be analytically described as follows: Of the twelve members thereof, seven are presently or formerly employed by the five major U.S. grain exporters, three are grain brokers dependent for their commercial success upon the continued confidence of those exporters, and two are importers or importer representatives. In short, the panel is dominated by the exporters' interests; in the present cases, therefore, where arguments will be made by petitioners which go to the heart of the exporters' preferred method of operation, petitioners, as importers, are relegated to having their arguments reviewed by the very people in whose interest it is to deny them.

Petitioners' position in these cases is not simply that the arbitrators as individuals have a bias against their positions and are therefore not competent to consider these disputes, but more fundamentally, that the panel *per se* has been improperly constituted and violates the principle expressed by this Court in *Commonwealth Coatings*.

It would appear to be no accident that ten of the twelve members of the grain arbitration panel have their allegiances, if not their actual commercial affiliations, with exporters. As Section 3 of the Grain Arbitration Rules makes it clear, the North American Grain Association, which is composed of primarily the major U.S. companies, has virtually the last word on appointments to the panel. Indeed, when the panel was established in 1973, the original members of the panel were all sponsored jointly by Cargill Incorporated and Continental Grain Co., parent corpora-

tions of two of the present respondents and the two largest U.S. grain companies.*

At least two questions seem to have been left open by the decision in *Commonwealth Coatings*: (1) whether a court operating under the United States Arbitration Act may disqualify an arbitrator or a panel of arbitrators and substitute a new arbitrator or panel, pursuant to 9 U.S.C. § 5, prior to the holding of hearings in the arbitration, and (2) whether, indeed, the court has the power to disqualify an entire panel at any time.

There have been cases dealing with the first question, at least as regards individual arbitrators, where disqualification preceded the holding of hearings. *Erving* v. *Virginia Squires Basketball Club*, 468 F. 2d 1064 (2nd Cir. 1972); *Matter of Astoria Medical Group* [*H.I.P.*], 11 N.Y. 2d 128, 132, 227 N.Y.S. 2d 401, 403 (1962) [state law]; *cf. Hawaii Teamsters & Allied Workers, Local 996* v. *Honolulu Rapid Transit Co. Ltd.*, 343 F. Supp. 419 (D. Hawaii 1972) [dictum]. It still remains for this court to give a definitive answer to the question whether, by virtue of the vacatur provisions of Section 10 of the Arbitration Act (9 U.S.C. § 10), an arbitrant or a potential arbitrant is precluded from questioning the qualifications of the arbitrators, not to mention the panel, at any time prior to the rendition of an award. In any event, even if such a position were conceded to be correct, it would still have no application to situations where an arbitration panel, as opposed to the designated individual arbitrators, could or should be disqualified, since different considerations would obtain.*

* It is worth noting that prior to the establishment of the panel in 1973, grain arbitrations had been conducted before the New York Produce Exchange, which maintained two panels. One, the general panel, heard primarily disputes which would involve issues such as these, and was composed of a truly broad spectrum of persons with interests in the foodstuffs and commodities industries. A second, grain panel, was also available to those parties which had a technical grain dispute and which desired that it be resolved by persons with a specific expertise in the execution of export grain contracts. As a result of the transfer of the functions to the American Arbitration Association, only the second, specialized panel is still operational.

As to the second question, no reported cases have been found directly on point, a fact which would indicate the need for clarification by this Court. *See*, however, *Erving* v. *Virginia Squires Basketball Club, supra,* and *Western Union Telegraph Co.* v. *Selby,* 62 N.Y.S. 2d 411; *aff'd without op.* 270 App. Div. 389, 61 N.Y.S. 2d 611, *aff'd* 295 N.Y. 395 (1946), which, by analogy, may be authority for the proposition that an arbitration panel is subject to disqualification, at least where the panel consists of a single individual.

These questions turn upon a construction of the United States Arbitration Act. When the extremely wide application of the Act is considered, as well as the distinct possibility of a recurrence of these questions in future litigation, it would be beneficial and appropriate for the Court to take jurisdiction of these cases in order to settle definitively the foregoing issues.

CONCLUSION

For the reasons hereinabove set forth, the writ or writs prayed for herein should issue.

Respectfully submitted,

David A. Botwinik
Counsel for Petitioners

* For example, it might be difficult to show a causal nexus between an arbitration award and a bias or imbalance in the panel from which the arbitrators are drawn. This is somewhat akin to the problem which a litigant faces when he has reason to believe that a jury panel has been improperly constituted, a problem which has been alleviated by the enactment of 28 U.S.C. § 1867.

APPENDIX A

Opinion of Supreme Court of the State of New York, New York County.

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

INDEX NO. 18935/75

In the Matter of the Application of:

R. PAGNAN & F. LLI for an order compelling the consolidation of the following two (2) arbitration proceedings:

R. PAGNAN & F. LLI (Arbitration Respondent)

Petitioner,

and

LOUIS DREYFUS CORPORATION (Arbitration Claimant) and
THE AMERICAN ARBITRATION ASSOCIATION,

Respondents.

WITH

R. PAGNAN & F. LLI (Arbitration Claimant)

Petitioner,

and

FRIBESCO S.A. (Arbitration Respondent) and
THE AMERICAN ARBITRATION ASSOCIATION,

Respondents.

STECHER, J.:

Petitioner moves for an order directing arbitration and consolidating the two proceedings in which arbitration has

been demanded before the American Arbitration Association. Respondent Fribesco S.A. cross-moves for an order staying arbitration.

Petitioner and respondents Louis Dreyfus Corp. and Fribesco S.A. are grain traders. Petitioner agreed to purchase from Dreyfus and sell to Fribesco 25,000 long tons of #3 Yellow corn, F.O.B. buyer's vessel for delivery in May 1975. Fribesco, as buyer, advised Pagnan to load the corn aboard the S.S. Mosgulf. A dispute arose between Dreyfus and Fribesco concerning Fribesco's right to have the corn sampled by a method selected by the buyer. Fribesco refused to accept delivery. Both seller and buyer declared petitioner to be in default for petitioner's failure to take delivery of the grain from Dreyfus or delivered to Fribesco. Dreyfus, seeking over $500,000 in damages from petitioner, has demanded arbitration. Petitioner, in turn seeks damages of $540,000 from Fribesco and it, likewise, had demanded arbitration. Fribesco resists arbitration as well as consolidation on two grounds: (1) that the matter in dispute involves a public policy question not subject to arbitration; and (2) that the arbitration panel is biased.

Fribesco does not seriously contest that there is a valid arbitration agreement between itself and petitioner. Rather, the thrust of its argument is that the dispute involves a public policy question. The argument is without merit. Whether the principles underlying the United States grain standards Act (7 U.S.C. § 71, et seq.) are being carried out by the Department of Agriculture is not an issue before this Court. Here, there is a straight forward contract of sale containing a broad arbitration provision. Petitioner seeks to invoke that clause and is entitled to do so.

> "It is immaterial that the buyer . . . contends that the failure to perform properly also entails a violation of law. Otherwise, it would be a rare arbitration agreement that could not be nullified merely by the contention of illegality in performance . . . It suffices that the agreement was lawful and called for lawful performance, . . ." In re, National Equipment Rental, Ltd. (American Pecco Corp.) 28 N Y 2d 639, 641.

Here, there is no public policy question involved which could cause this court to modify a contract arrived at by arms length bargaining between experienced parties represented by able counsel. If Fribesco desired to provide for a different method of sampling the corn it should have so provided in its contract with petitioner. It failed to do so and cannot now invoke the aid of the court to modify a lawful contract.

Fribesco's second objecion is directed to the alleged bias of the arbitration panel. The arbitration is governed by the grain arbitration rules of the American Arbitration Association. The panel from which the arbitrators are to be selected is composed of employees of the major grain traders and brokers in the grain trade, for the obvious purpose of providing expertise in a highly specialized field. It is Fribesco's argument that practically every member of the panel would be subject to challenge because of the substantial business dealings engaged in between the employers of the panel members and parties adverse to this proceeding. To the extent that the attack is on individual panel members, it is at best premature. The rules of the American Arbitration Association (Art. V Sec. 11), which by the parties' contracts govern the resolution of their disputes, provide for a disclosure and challenge procedure. To the extent that it is the panel itself which is challenged, the challenge is to a provision of the parties' own contracts with which the court will not at this stage interfere (cf. CPLR 7511(b)(1) (ii)). They have made their contract and the court will enforce it (Matter of Astoria Medical Group v. Health Ins. Co., 11 N Y 2d 128).

Appendix A.

The cases relied on by Fribesco do not sustain its position. Commonwealth Coating Corp. v. Continental Casualty Co. (393 U.S. 145), holds that where a "neutral" arbitrator has failed to disclose substantial business dealings with one of the parties an arbitration award must be vacated. This is obviously not the case here. All the parties and members of the arbitration panel are involved in the grain trade, an industry made up of a small number of companies. The Court of Appeals for the Second Circuit has held that dealings in the ordinary course of business between an arbitrator and parties to the arbitration will not disqualify an arbitrator, where, as here,

> ". . . the parties have agreed to arbitration with full awareness that there will have been certain, almost necessary, dealings between a potential arbitrator and one of the opposing parties . . .".

Garfield & Co. v. Wiest, 432 F 2d 849, 854, cert. denied, 401 U.S. 940, see also, Perl v. General Fire & Casualty Co., 34 A D 2d 748) In Cook Industries, Inc. v. C. Itoh & Co. (America), Inc. (449 F 2d 100 Cert. denied, 405 U.S. 921) a dispute concerning the performance of a contract to sell corn, had proceeded to arbitration. After the arbitrators had ruled in respondent's favor, petitioner sought to vacate the arbitration award urging that there was "evident partiality" within the meaning of 9 USC § 10(b) and Commonwealth Coatings Corp. v. Continental Casualty Co., supra, (Heavily relied on by Fribesco), because Cargill, Inc., the employer of one of the arbitrators had substantial business dealings with respondent, a fact, not disclosed before the arbitration. The U.S. Court of Appeals in upholding the arbitration award, found no extraordinary dealings between respondent and Cargill. As in Cook Industries, so here all the parties were fully aware of the composition of the arbitration panel. Fribesco has failed to show any partiality on

Appendix A.

the part of the arbitration panel. The motion to direct Fribesco S.A. to proceed to arbitration is granted and Fribesco's cross-motion is denied.

That part of the motion seeking consolidation of the two captioned proceedings is also granted. In re Vigo Corp. v. Marship Corp. of Monvoria, (26 N Y 2d 157).

Settle order.

DATED: October 6, 1976.

M. B. S.
J. S. C.

APPENDIX B

Orders of Affirmance of Appellate Division, First Department.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 2, 1977.

Present—Hon. Francis T. Murphy, Jr., Presiding Justice,
Vincent A. Lupiano,
Herbert B. Evans,
Louis J. Capozzoli,
Arthur Markewich, Justices.

375-376N

In the Matter of the Application of Otello Mantovani,

Petitioner-Appellant,

For an Order Staying the Arbitration Sought to be Commenced by

Tradax Overseas, S.A.,

Respondent-Respondent.

Appeals having been taken to this Court by the petitioner-appellant from an order of the Supreme Court, New York County (Stecher, J.), entered on November 8, 1976, granting respondent's motion to quash a subpoena, and from a judgment of said court entered on November 22, 1976, denying the petition and directing the parties to proceed to arbitration, and said appeal having been argued

by Mr. David A. Botwinik of counsel for the appellant, and by Mr. John F. O'Connell of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed on the opinions of Stecher, J., in the companion cases of *Fribesco-Mitsui* and *R. Pagnan & F. LLI.-Finagrain;* and that the judgment so appealed from be and the same is hereby affirmed on the opinion of Stecher, J. in *R. Pagnan & F. LLI.-Finagrain.* Respondent shall recover of appellant $40 costs and disbursements of these appeals.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Appendix B.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 2, 1977.

Present—Hon. Francis T. Murphy, Jr., Presiding Justice,
Vincent A. Lupiano,
Herbert B. Evans,
Louis J. Capozzoli,
Arthur Markewich, Justices.

368-369N

In the Matter of the Application of R. PAGNAN & F.LLI. for an Order Compelling the Consolidation of the Following (2) Arbitration Proceedings

R. PAGNAN & F.LLI. (Arbitration Respondent),

Petitioner-Respondent,

and

LOUIS DREYFUS CORPORATION (Arbitration Claimant) and the AMERICAN ARBITRATION ASSOCIATION,

Respondent-Respondent,

with

R. PAGNAN & F.LLI. (Arbitration Claimant),

Petitioner-Respondent,

and

FRIBESCO S.A. (Arbitration Respondent) and the AMERICAN ARBITRATION ASSOCIATION,

Respondent-Appellant and Respondent-Respondent.

Proceeding No. 3
Index No. 18935/75

Appendix B.

Appeals having been taken to this Court by the appellant Fribesco S.A. from a judgment of the Supreme Court, New York County (Stecher, J.), entered on November 8, 1976, granting petitioner's application for consolidation and for arbitration and denying appellant's cross-motion; and from an order of said court entered on January 3, 1977, resettling the aforesaid judgment,

And said appeals having been argued by Mr. David A. Botwinik, of counsel for the appellant, by Mr. Bennet Hugh Silverman, of counsel for the petitioner-respondent, and by Mr. Francis J. O'Brien, of counsel for respondent Dreyfus; and due deliberation having been had thereon,

It is unanimously ordered that the order entered on January 3, 1977, so appealed from be and the same hereby is affirmed on the opinion of Stecher, J., dated October 6, 1976; and the appeal from the judgment entered on November 8, 1976, be and the same hereby is dismissed as academic. Respondents Pagnan and Dreyfus shall recover of appellant one bill of $40 costs and disbursements of these appeals.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Appendix B.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 2, 1977.

Present—Hon. Francis T. Murphy, Jr., Presiding Justice,
Vincent A. Lupiano,
Herbert B. Evans,
Louis J. Capozzoli,
Arthur Markewich, Justices.

370-372N

In the Matter of the Application of R. PAGNAN & F.LLI for an Order Compelling the Consolidation of the Following Two (2) Arbitration Proceedings

R. PAGNAN & F.LLI. (Arbitration Respondent),
Petitioner-Respondent,

FINAGRAIN S.A. COMPAGNIE COMMERCIALE AGRICOLE ET FINANCIERE a/k/a "FINAGRAIN" COMPAGNIE COMMERCIALE AGRICOLE ET FINANCIERE S.A. (Arbitration Claimant) and the AMERICAN ARBITRATION ASSOCIATION,
Respondents-Respondents,

with

R. PAGNAN & F.LLI. (Arbitration Claimant),
Petitioner-Respondent,

and

FRIBESCO S.A. (Arbitration Respondent) and the AMERICAN ARBITRATION ASSOCIATION,
Respondent-Appellant and
Respondent-Respondent.

Proceeding No. 2
Index No. 18143/1975

Appendix B.

Appeals having been taken to this Court by the appellant Fribesco, S.A. from an order of the Supreme Court, New York County (Stecher, J.) entered on October 8, 1976, granting respondent Finagrain's motion to quash a subpoena duces tecum; from a judgment of said court entered on November 8, 1976, granting petitioner's application for consolidation and for arbitration and denying appellant's cross-motion; and from an order of said court entered on January 3, 1977, resettling the aforesaid judgment,

And said appeals having been argued by Mr. David A. Botwinik, of counsel for the appellant, by Mr. Sheldon A. Vogel, of counsel for respondent Finagrain, and by Mr. Bennet Hugh Silverman, of counsel for the petitioner-respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order entered on October 8, 1976, so appealed from be and the same hereby is affirmed on the opinion of Stecher, J. and the opinion of Stecher, J. in the companion proceeding of *Fribesco-Mitsui;* the order entered on January 3, 1977, so appealed from be and the same hereby is affirmed on the opinion of Stecher, J., dated October 6, 1976; and the appeal from the judgment entered on November 8, 1976, be and the same hereby is dismissed as academic. Respondents Pagnan and Finagrain shall recover of appellant one bill of $40 costs and disbursements of these appeals.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Appendix B.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 2, 1977.

Present—Hon. FRANCIS T. MURPHY, JR., Presiding Justice,
VINCENT A. LUPIANO,
HERBERT B. EVANS,
LOUIS J. CAPOZZOLI,
ARTHUR MARKEWICH, Justices.

373-374N

In the Matter of the Appication of Fribesco, S.A.,
Petitioner-Appellant,

For an Order Staying the Arbitration
Sought to be Commenced by

Mitsui & Co. (U.S.A.), Inc.,
Respondent-Respondent.

Appeals having been taken to this Court by the petitioner-appellant from a judgment of the Supreme Court, New York County (Stecher, J.), entered on November 9, 1976, denying petitioner's application for a stay of arbitration, and from an order of said court entered on November 9, 1976, granting respondent's motion to quash a subpoena, and said appeal having been argued by Mr. David A. Botwinik of counsel for the appellant, and Mr. Howard F. Ordman of counsel for the respondent; and due deliberation having been had thereon,

Appendix B.

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed on the opinion of Stecher, J., dated October 6, 1976; and the order so appealed from be and the same is hereby affirmed on the opinion of Stecher, J. and on the opinion of Stecher, J. in the companion proceeding of *R. Pagnan & F.LLI.—Finagrain.* Respondent shall recover of appellant one bill of $40 costs and disbursements of these appeals.

ENTER:

JOSEPH J. LUCCHI
Clerk

APPENDIX C

Order of Court of Appeals, State of New York, Denying Motion for Leave to Appeal.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighteenth day of October A. D. 1977

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

Mo. No. 724

In the Matter of

the Application of Fribesco, S.A.,

Appellant,

For an Order Staying the Arbitration Sought to be Commenced by Mitsui & Co., (U.S.A.), Inc.

Respondent.

& 3 additional proceedings—
Mtr. of R. Pagnan & F.LLI.
(Fribesco S.A., Appellant),
Mtr. of R. Pagnan & F.LLI.
(Fribesco S.A., Appellant),
Mtr. of Otello Mantovani, Appellant—
Tradax Overseas, S.A.

A motion for leave to appeal &c. to the Court of Appeals in the above cause having been heretofore made upon the

part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary printing disbursements.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

APPENDIX D

Statutes and Regulations.

UNITED STATES GRAIN STANDARDS ACT (Title 7, U.S.C., prior to amendment by P.L. 94-582)

SEC. 2 *"Declaration of policy*

Grain is an essential source of the world's total supply of human food and animal feed and is merchandised in interstate and foreign commerce. It is declared to be the policy of the Congress, for the promotion and protection of such commerce in the interests of producers, merchandisers, warehousemen, processors, and consumers of grain, and the general welfare of the people of the United States, to provide for the establishment of official United States standards for grain, to promote the uniform application thereof by official inspection personnel, to provide for an official inspection system for grain, and to regulate the weighing and the certification of the weight of grain shipped in interstate or foreign commerce in the manner hereinafter provided; with the objectives that grain may be marketed in an orderly and timely manner and that trading in grain may be facilitated." 7 U.S.C. § 74

SEC. 5 "Official inspection requirements waiver for certain export grain

Whenever standards are effective under section 4 of this Act for any grain, no person shall ship from the United States to any place outside thereof any lot of such grain that is sold, offered for sale, or consigned for sale by grade, unless such lot is officially inspected in accordance with such standards on the basis of official samples taken after final elevation as the grain is being loaded aboard, or while it is in, the final carrier in which it is to be transported from the United States, and unless a valid official certificate showing the official grade designation of the lot of grain is

promptly furnished by the shipper, or his agent, to the consignee with the bill of lading or other shipping documents covering the shipment; *Provided, however,* That the Secretary may waive any requirement of this section with respect to shipments from or to any area or any other class of shipments when in his judgment it is impracticable to provide official inspection with respect to such shipments." 7 U.S.C. § 77

SEC. 7 "Official inspection authority and funding

(a) The Secretary is authorized to cause official inspection under the standards provided for in section 4 of this Act to be made of all grain required to be officially inspected as provided in section 5 of this Act, in accordance with such regulations as he may prescribe.

• • •

"(d) Certificates issued and not canceled under this Act shall be received by all officers and all courts of the United States as prima facie evidence of the truth of the facts stated therein." 7 U.S.C. § 79(a) and (d)

DEPARTMENT OF AGRICULTURE REGULATIONS
(Title 7, C.F.R.)

§ 26.110 Mandatory inspection—export grain.

(a) *General requirements.* Whenever standards are effective under the Act for any grain, an official inspection for grade must, except as provided in paragraph (g) of this section, be obtained for each lot of such grain which is to be shipped from the United States to any place outside thereof and is sold, offered for sale, or consigned for sale by grade. Inspection is also required as prescribed in § 26.111 for export and other grain if it is in a container which shows an official grade designation or an

official inspection mark; or the grain is represented to have been officially inspected.

(b) *Who must obtain inspection.* The official inspection for official grade of export grain must be obtained by or for the exporter of record, unless a certificate sufficient for purposes of section 5 of the Act has previously been obtained. The conditions under which the grain is offered for inspection must meet the requirements of §§ 26.9 and 26.11. If the grain is inspected at the time of loading, the carrier or stowage space(s) for the grain must be examined by official inspection personnel and found to be clean, dry, and free of insects, other vermin, commercially objectionable foreign odors, and other factors which could contaminate the grain or lower the grade of the grain.

(c) *Scope and basis of inspection.* The inspection for official grade and official factors shall be in accordance with the official grain standards.

(d) *Sampling requirements.* (1) The inspection for official grade and official factor information must be based on official samples obtained from the grain as it is being loaded aboard, or while it is in the final carrier in which it is to be transported from the United States: *Provided,* That the inspection of sacked grain may be based on an initial inspection as the grain is being sacked and a final inspection as the sacks of grain are being loaded aboard the final carrier in which they are to be transported from the United States, in accordance with instructions issued by the Administrator.

(2) The samples must be obtained by official inspection personnel (other than licensed employees of a grain elevator or warehouse).

(3) After May 1, 1976, all bulk export cargo grain officially inspected shall be sampled by means of approved

diverter-type mechanical samplers: *Provided,* That if an export elevator or export loading facility cannot meet the May 1, 1976, deadline for installation and approval of diverter-type mechanical samplers because of necessary construction or other conditions beyond the control of the elevator or facility the Administrator may:

(i) Upon written request by an export elevator or export loading facility for extension of time, review the circumstances of the request and, if warranted, grant an extension based on the circumstances of each request. Such extension shall be based on evidence in the written request that a diligent effort has been made to meet the May 1 deadline; but because of necessary construction or other conditions or circumstances beyond the control of the person or firm making the request, the installation and approval of diverter-type mechanical samplers cannot be achieved by the May 1, 1976, deadline.

(ii) Require in each case where an extension beyond the May 1, 1976, date is granted, that each official inspection certificate issued during such period of extension for a bulk export cargo lot at such export elevator or export loading facility shall contain the statement,

The lot of grain represented by this certificate was sampled by .....
(type of sampling
.....
method)

(iii) Require that if installation and approval of diverter-type mechanical samplers are not achieved by the requesting party during the period of extension beyond the May 1, 1976, date granted by the Administrator, each official inspection certificate issued after the termination of the allowed extension period at the export elevator or export loading facility shall contain the statement,

The lot of grain represented by this certificate was sampled by means of ..... (type of ..... and samples obsampling method)

tained by such method may not be as representative as those obtained by approved diverter-type mechanical samplers.

This statement will also be applicable to official inspection certificates issued for export cargo lots at export elevators or export loading facilities that have not installed approved diverter-type mechanical samplers by May 1, 1976, and are not granted an extension by the Administrator.

(iv) Provide that after installation and approval of diverter-type mechanical samplers at an export elevator or export loading facility, the method of sampling statement shall not be required to be shown on official export inspection certificates issued at that location.

(4) Bulk export cargo grain which is officially inspected shall be sampled as it is being loaded aboard the final carrier. The samples must be obtained as near as practicable to the end of the final loading conveyance, unless otherwise approved by the Administrator under such conditions as he determines will provide representative samples and maintain the integrity of the inspection service: *Provided,* That:

(i) All export elevators or export loading facilities where official inspection of bulk cargo shipments of grain is performed shall be so constructed and operated that no grain or other material may be introduced or added to the stream of grain at any point from diverter-type mechanical samplers to the final carrier, except for those

materials specifically approved by the Administrator under conditions prescribed in the instructions; e.g., the addition of an approved fumigant or pesticide to control insect infestation.

(ii) At export elevators or export loading facilities where diverter-type mechanical samplers are presently installed or located other than near the end of final loading conveyance, the Administrator may, if he determines that any means have been employed to circumvent such diverter-type mechanical samplers that affects the representativeness of samples obtained, require that the samplers be relocated as near as practicable to the end of the final loading conveyance.

(iii) For new export elevators or export loading facilities which begin construction after May 1, 1976, the diverter-type mechanical samplers installed to obtain official samples for inspection shall be installed as near as practicable to the end of the final loading conveyance.

(iv) If an export elevator or export loading facility which is presently operating begins renovation or remodeling after May 1, 1976, and such renovation or remodeling includes the area in which diverter-type samplers are already installed and will affect the sampling system; and if such diverter-type mechanical samplers are not located as near as practicable to the end of the final loading conveyance, the Administrator may, at the time of renovation or remodeling, require the diverter-type mechanical samplers to be relocated as near as practicable to the end of the final loading conveyance.

(v) The Administrator may waive such requirements for (A) classes of shipments of sacked grain which are impracticable to sample with diverter-type mechanical samplers while grain is being loaded aboard or while it is in the final carrier, and (B) emergency situations such as mechanical or power failure.

(5) The term "final loading conveyance" shall be deemed to mean the mechanical equipment, device, or apparatus used to transport or move the grain from the elevator bins or tanks to the spout or device which directly delivers the grain into a container or carrier which will transport the grain from the United States.

(e) *Where to obtain inspection.* A request for an original inspection on export grain shall be filed in accordance with § 26.26; for reinspection in accordance with § 26.36; and for appeal inspection in accordance with § 26.46. Exceptions to the requirements of this paragraph may, upon request of the applicant, be made by the Administrator. (For locations where official inspection services are available, see § 26.9(d).)

(f) *Certification requirements.* Subject to paragraph (g) of this section, only an unsuperseded and unqualified official grain inspection certificate for official grade shall be deemed to meet the requirements of section 5 of the Act. The original of the unsuperseded inspection certificate must be forwarded by the shipper or his agent, to the consignee or to his order with the bill of lading or other shipping documents covering the shipment.

(g) *Exemptions.* (1) The mandatory inspection and certification provisions of paragraphs (a) through (f) of this section are waived with respect to export grain which (i) is not shipped from or through a designated inspection area; or (ii) is in lots of 500 bushels or less, and is located 50 or more miles from the nearest designated inspection point (For locations where official inspection services are available, see § 26.9(d).); or (iii) is shipped from or through a designated inspection area where official inspection is ordinarily obtainable but the applicant for service is notified by the official inspection agency or field office where the application was filed that official inspection per-

sonnel are temporarily not available to perform the required inspection as determined in each specific case by the Administrator: *Provided,* That no exemption under this subparagraph shall be applicable to export grain which is in a container which shows an official grade designation or an official inspection mark, or to grain which is represented to have been officially inspected and is required to be inspected under § 26.111.

(2) The invoice covering each lot which is shipped under any exemption prescribed in subparagraph (1) of this paragraph shall clearly show the statement. "This lot not officially inspected for grade."

United States Arbitration Act (Title 9, U.S.C.)

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A writen provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming

Appendix D.

of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 10. SAME; VACATION; GROUNDS; REHEARING

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

APPENDIX E

Excerpts From Form No. 2 N.A.E.G.A.

Bought of .....

Sold to .....

ON THE CONDITIONS AND RULES INCORPORATED HEREIN

• • •

Commodity

.....

In accordance with the official grain standards of the United States or Canada, whichever applicable, as in effect on contract date.

• • •

Quality

Quality and condition to be final at port/s of loading in accordance with official inspection certificate/s.

• • •

Delivery

Delivery between the dates of ..... and ....., both inclusive, at discharge end of loading spout, to buyer's tonnage in readiness to load, in accordance with custom of the port/s but always subject to elevator tariff/s.

• • •

(SEE CONDITIONS AND RULES ON OTHER SIDE)

Appendix E.

CONDITIONS AND RULES

• • •

3. ARBITRATION. Buyer and seller agree that any controversy or claim arising out of, in connection with or relating to this contract, or the interpretation, performance or breach thereof, shall be settled by arbitration in the City of New York before the American Arbitration Association or its successors, pursuant to the Grain Arbitration Rules of the American Arbitration Association, as the same may be in effect at the time of such arbitration proceeding, which rules are hereby deemed incorporated herein and made a part hereof, and under the laws of the State of New York. The arbitration award shall be final and binding on both parties and judgment upon such arbitration award may be entered in the Supreme Court of the State of New York or any other Court having Jurisdiction thereof. Buyer and seller hereby recognize and expressly consent to the jurisdiction over each of them of the American Arbitration Association or its successors, and of all the Courts in the State of New York. Buyer and seller agree that this contract shall be deemed to have been made in New York State and be deemed to be performed there, any reference herein or elsewhere to the contrary notwithstanding.

• • •

APPENDIX F

Excerpts From American Arbitration Association Grain Arbitration Rules as in Effect November 1, 1973.

AMERICAN ARBITRATION ASSOCIATION

GRAIN ARBITRATION RULES

I. DEFINITIONS

Section 1. As used in these Rules:

(a) The term "AAA" means American Arbitration Association.

(b) The term "the Arbitration Advisory Committee" means the Arbitration Advisory Committee of North American Export Grain Association Incorporated.

(c) The term "these Rules" means the Grain Arbitration Rules of AAA as they exist at the time an arbitration is initiated under them.

(d) The term "Administrator" means AAA or its designated representative.

(e) The term "Panel" means the current list of persons available to serve as arbitrators under these Rules, as is described in Section 3 of these Rules.

II. RULES A PART OF THE ARBITRATION AGREEMENT

Section 2. Whenever parties have entered into a contract that provides for arbitration (a) under the Grain Arbitration Rules of AAA or (b) before the Arbitration Committee of the New York Produce Exchange or of Inter-

national Commercial Exchange, Inc. (or, if mutually agreed upon by the parties at the time arbitration is requested, before the Committee on Grain of the New York Produce Exchange or of International Commercial Exchange, Inc.) or the successors to any or all of the Arbitration Committee, the Committee on Grain of the New York Produce Exchange or International Commercial Exchange, pursuant to the "Grain Arbitration Rules of the New York Produce Exchange", those parties shall conclusively be deemed to have made these Rules and any amendments of them a part of their arbitration agreement.

III. ARBITRATORS

Section 3. The Administrator shall maintain a current list of the names of persons, who are actively engaged in, or have retired from active engagement in, the grain trade business, available to serve as arbitrators under these Rules. The Arbitration Advisory Committee shall, at the request of the Administrator or may, at its discretion, appoint persons to the list. The Administrator may also, at its discretion, appoint persons to the list.

For the hearings of arbitrations under these Rules, any three members of the Panel, chosen as provided in Section 9 of these Rules, shall constitute the Board of Arbitrators.

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V. APPOINTMENT OF ARBITRATORS

Section 8. Qualifications

No person shall serve as an arbitrator in any arbition if he has any financial or personal interest in the result of the arbitration, unless the parties waive such disqualification in writing.

Section 9. Selection of Arbitrators

Arbitrations under these Rules shall be held before three arbitrators who, subject to their availability to serve, as determined by the Administrator, shall be chosen by the Administrator from the Panel in alphabetical order of their surnames, starting with the first name on the list and continuing through to the end. For the next and each following arbitration, arbitrators shall be chosen as provided in the preceding sentence, starting with those eligible on the Panel who have not served on the previous arbitration. The same method of choosing arbitrators shall be repeated from the beginning to the end of the Panel as often as is necessary in order to choose the number of arbitrators required for any given arbitration.

Section 10. Notice to Arbitrators of Appointment

Notice of the appointment of the arbitrators shall be mailed to each of the arbitrators by the Administrator, together with a copy of these Rules, and a signed acceptance of the arbitrator shall be filed prior to the opening of the first hearing.

Section 11. Disclosure and Challenge Procedure

A person appointed as an arbitrator shall disclose to the Administrator any circumstances likely to affect his impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such arbitrator or other source, the Administrator shall communicate such information to the parties, and, if the Administrator deems it appropriate to do so, to the arbitrators. Thereafter, AAA shall determine whether the arbitrator should be disqualified and the Administrator shall inform the parties of the decision of AAA.

Appendix F.

Section 12. Vacancies

If any arbitrator resigns, dies, withdraws, refuses to serve, is disqualified or is unable to perform the duties of his office, the Administrator shall, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these Rules and, unless the parties agree otherwise, in writing, the matter shall continue to be heard or shall be reheard, as the arbitrators deem to be appropriate, before the remaining arbitrators and the newly designated arbitrator.

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